ALTERNATIVE DISPUTE RESOLUTION

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Description of Module

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Alternative Dispute Resolution

A human being is a social animal. He cannot exist in isolation. He has been endowed by the nature, with capabilities which are unique and make him different from rest of the animals. This man also has his needs, the most important being his need to be in the company of his fellow human beings. It is this interdependence, which makes humans live and associate with each other. There is no doubt that collective living has solved many a problems. But while living together, the individual interests of these humans definitely would come in conflict with the interest of the others. These conflicts, are what we term as disputes. In the present day, the Dispute Resolution Systems are divided into two categories; the regular method of resolving of disputes (RDR- Regular Dispute Resolution) which refers to the regular judicial setup; and alternative way of resolving of disputes (ADRAlternative Dispute Resolution) which refers to the four methods (Negotiation, Mediation, Conciliation and Arbitration) created to resolve dispute outside court. Presently the ADR is the main source of resolution of dispute in the areas of family, property, insurance and corporate disputes.

Disadvantages of Regular Dispute Settlement system

1.Delay

This is a major problem which the judiciary is affected with. Once delay is caused due to some reasons like, technicality, backlog, or lack of expertise; it leads to increase in the expenses, which again causes backlog and overburdening of the judiciary.

2. Unpredictability

The fate of the parties in judicial proceedings is in the hands of two persons; the judge and the lawyer. The expertise of the lawyer and the understanding capacity of the judge, decides the fate of the litigation. Therefore, the proceedings become highly unpredictable as the procedural law is influenced by human nature. An expert lawyer would be able to quote the set of facts in a very subtle manner and convince the judge about the merits of his case, but a novice may fail to do so. The facts are same but the results may be different due to difference in expertise of the lawyers.

3. Backlog

The disparity between judge and population ratio, builds pressure on the judiciary. The pressure reduces the efficiency of the Authority, thereby affecting the efficiency of the institution as a whole. The reasons for the backlog may be many. But the most important are technicality, delay tactics adopted by the lawyers and clients, and less number of judges.

4. Expensive proceedings

Justice in not for free, and the parties have to spend a lot money to obtain it. The expenditure includes mainly the lawyer's fee and the court fees. However, this is only the part of the expenses. There are expenses on logistics, like travel to the court from the place of residence and incidental expenses, travel cost incurred in bringing witnesses, expenses included in helping the court to find out real facts in issue, appointment of Commissioner, Receiver etc. When these are added to the lawyers and court fees, it makes justice prohibitive.

5. Concentration of Work

This drawback is not with the judiciary, but with the friend of court, the Advocate. Even though, a fair number of advocates are practicing in the city or town, 85% of the cases are with 15 to 20% of practicing advocates. Remaining 80% of advocates deal with the remaining 15% of cases. This results in to overburdening of those few practitioners and their inability to present the case when court is ready to hear the matter. One of the main causes of adjournment is that the lawyer is engaged in presenting a case before another judge at the same time. The problem of concentration of work affects the speedy disposal of cases.

Technicality

For the Judge, it is not feasible to explain the procedure, and the advocates have no time to explain. In the court of law, the rights of the parties are decided in their very presence where the sad fact is that they may not have the slightest idea about the proceedings due to the procedure which is highly technical. Another important reason is the language of the law and the courts which is beyond the understanding of a lay man. The lack of understanding of the court proceedings develops suspicion in the minds of the litigants and they express their unwillingness by disobeying the orders of the court, leading to further litigations.

Advantages of the ADR system.

Anyone can easily avail ADR, Faster Remedy, No Institutional Barrier, Protect Interest, Win – Win situation, Low cost, Greater Participation of Parties, Problem solving.

Kinds of ADR

Negotiation

Is conflict bad? Would life is happier if no conflict in life exists? Though the answer to these questions as 'NO' sounds strange, in reality conflicts help the growth of the society. People differ and they use negotiation to resolve their differences by using negotiation as a method. Imagine, if you would like to buy a television, would you agree to the price quoted by the seller? Or would you bargain? Is bargaining a way of negotiation and resolving the differences between you the buyer, and the seller? The answer would be yes. Therefore, everyone is a negotiator and every one negotiates several times in his life time. That is the reason why negotiation is treated as the most important mode of alternative dispute resolution. It is the primary method of resolution of disputes. The success and failure of this mode has resulted in the development of the more refined methods. All these refined processes have negotiation as the foundation on which new alternatives have been added later to overcome the defects.

Negotiation is a process, which focuses on protection of the interests of the parties through adjustment. This is in contrast to the approach of the judiciary which tries to protect the right of an individual by enforcing it or ordering compensation for it. Second important departure, is the concept of relationship. Negotiation concentrates on protection of relationship between the parties, for which the judiciary shows complete disregard.

Kinds of Negotiation

i. Informal negotiation:

It is a direct communication between the parties. Here the intervention of a third person or an outsider does not exist. Only the affected parties are involved in the dialogue and discussion for the purpose of resolving the dispute. Chances of failure of this process are high.

Advantages:

Informal negotiations are secretive, Involvement of a third person is nil , There are no procedural hassles during negotiation.

Disadvantages: Interests are replaced with egos, Breaking down of negotiation leads to additional enmity, Frequently ends with deadlock

ii. Formal Negotiation

To overcome the defects of the informal negotiation, a modification was introduced and it became another genera of negotiation called the 'formal negotiation'. The modification is in the form of introduction of a third party as a representative of the parties to the dispute. Each party here appoints a negotiator, and this negotiator is supposed to negotiate on behalf of the parties. In this process the parties remain in control of the process through the negotiator, though they have no direct control over it. The negotiator has to negotiate on the basis of the interests expressed to him by the party which appoints him

Advantages:

Negotiator can successfully avoid deadlocks, Negotiator can adopt a different approach all together, Protection of interests reduces enmity

Disadvantages

It may end with deadlock ,Parties may force the negotiator to take a definite position.

Mediation

The fundamental process in mediation is nothing but a negotiation. However, mediation is a slightly modified version which has been developed to overcome the defects involved with the negotiation process. "Mediation is a dispute resolution process where the parties discuss the subject matter in presence of the third party called mediator, who is experienced and has trust and faith of both parties and who tries to bring out an amicable settlement between the parties." The above definition makes it very clear that the main difference between negotiation and mediation is the involvement of a third person called the Mediator. This person acts as a catalyst between the parties and tries to achieve an amicable settlement between parties. Involvement of the third party does not change the style of proceedings. It basically remains a negotiation, but takes place in the presence of a third person.

Role of a Mediator

The main role of the mediator is to avoid deadlocks. The purpose of his appointment is to keep the parties at the negotiation table. If any party tries to break the negotiation process, then mediator becomes active and immediately gets involved in resolving the deadlock.

1. He must maintain neutrality 2. He should maintain confidentiality 3. He should separate people from the problem 4. He should motivate parties to negotiate. 5. He needs to counsel the negotiators about the process of mediation. 6. He should provide scope of venting emotions by the parties 7. Sometimes mediator may act as face saver. 8. He must resist the temptation of being a via media 9. He must help the negotiators in identifying interests.

Stages of Mediation

1. Convening Process – At this stage mediator makes preliminary arrangements such as the venue for mediation and time. It is always better to select a neutral venue for conducting mediation. Before fixing the time and venue you may need to consult both the parties for their consent and availability.
2. Mediator's introduction and developing ground rules to be followed in the Mediation. The first session of mediation involves two important components, where in the mediator needs to introduce himself and the procedure that is going to be followed during the mediation.
3. Statement of problem by Negotiators. After mediator's introduction both the parties may be allowed to state the problem.
4. Re-statement of the problem by mediator – After hearing the problem from both the parties, you need to restate the problem. Restating the problem means you are summarizing the problem. Summarizing the problem has its own advantage. It not only shows that you have

understood the dispute between the parties, but also that if there is an thing missing the parties would be free to add.

5. Collection of additional information if necessary- In case the problem explained by the parties is not clear or more information is required to understand the dipute fully and properly, the mediator may seek additional information or documents in support of such dispute.
6. Setting the agenda for Mediation – Once the problem is clear the mediator needs to set the agenda. Setting agenda is similar to framing issues. It is nothing but identifying the differences and framing them in the form of issues for negotiation
7. Facilitating negotiation – After framing issues the mediator invites the negotiators to negotiate.
8. Mediator generating options- Remember the negotiation principles. Generating options is more important for a successful negotiation. Therefore, mediator must encourage and help the parties to generate options. He needs to play proactive role in generating options.
9. Private meetings if necessary- In case of necessity you may hold private meetings. Private meeting means you could talk to only one party and request the other party to move out of the mediation room.
10. Persuasion to reach a settlement- The role of the mediator in mediation is not of a mute spectator but he has to actively involve the parties to reach a settlement. Therefore, persuasion to reach settlement does not mean that the mediator will force the parties for settlement, but he will encourage and motivate the parties to settle.
11. Realistic Agreement– If the negotiation is successful and the parties reach a settlement then the mediator should see whether the agreement is realistic. At this stage mediator is not assessing whether the agreement between the parties is reasonable he has to see whether it is an enforceable agreement according to the law.
12. Summing up and reducing the settlement into writing- Once the mediator is satisfied that the agreement is enforceable by law then he needs to sum up the agreement and write the same. After that he should make sure that the parties read it, and then get their approval.

Conciliation

Conciliation procedure Conciliation being a voluntary process, the law has taken ample care to provide voluntariness. The involvement of the parties is taken care of in each and every stage of the conciliation. Along with this law also has taken care to avoid unnecessary delay tactics which parties may employ during the conciliation process.

Appointment

The parties have prerogative to seek appointment of the Conciliator. The appointment can be done in consultation with both parties. In case of lack of consensus, the parties can appoint their own conciliator. Even though law provides for appointment of two conciliators, the spirit of the process of conciliation and the role of conciliator makes it necessary to conduct conciliation with only one conciliator.

Submission of statements

Once the appointment of conciliator is sought, he will request the parties to provide brief written information of the dispute. This information helps him to understand the general nature of the dispute as well as the points at issue. This general information may be later asked to be supported by documents and other evidences. These additional information and evidences can be used to convince the conciliating party to reach a settlement.

Role of the Conciliator

He should be independent and impartial. His role is to act as a catalyst and bring in speedy and amicable settlement among the parties. The role of the conciliator is guided by the major principles of objectivity, fairness and justice. While acting as conciliator he should give due regard to the rights and obligation of the parties, usages of the trade and circumstances surrounding the dispute. To bring in speedy settlement, the conciliator may make a proposal of settlement. Such proposals will be kept for further discussion. Conciliation officer is required to maintain confidentiality. Any information disclosed to him cannot be used against the disclosing party in any proceeding before any authority. This provision helps parties to act freely and fairly in conciliation.

Settlement Agreement

The settlement agreement is arrived at by the parties with the assistance of the conciliator. Basically it is a document of consent between parties wherein the conciliator has acted only as a facilitator.

Arbitration

The importance of Arbitration as a process has increased manifold due to the advent of globalization. As the multinational and transnational companies began investing in India, they started giving preference to the outside court settlement in the form of arbitration. As they used these provisions extensively, the process of Arbitration became attractive. Further, the increased protection granted to the parties and the award pronounced by the arbitrator due to passing of the Arbitration and Conciliation Act, 1996 encouraged the role of arbitration in settling civil disputes. Arbitration has no resemblance with the other ADR processes. The base for all the ADR processes has been Negotiation. But in arbitration there is no negotiation between parties. Arbitration resembles adversarial process more. Therefore, arbitration would be a suitable process where the parties do not wish to spend time in the court but would like their dispute to be decided by a neutral third party. In arbitration any dispute or difference may be referred to a third person for determination. Therefore, we can say that arbitration is a

process conducted by a private judge appointed by the parties, who conducts hearing and decides the dispute between the parties.

Arbitrators should be appointed by mutual consent of the parties, and in case there is no consensus then they may approach the court for appointment of arbitrator. The arbitrator appointed either by the parties or by the court shall give equal treatment and full opportunity to parties. The place of arbitration and language to be used during the proceedings could be decided by the parties with mutual consent. In absence of such consent the arbitrator would decide.

In case of domestic disputes the arbitrator needs to decide the dispute in accordance with the substantive law in force. If the dispute involves international commercial dispute then the law of the country as agreed by the parties would apply. In the absence of such an agreement, the arbitrator would decide about which country's law would apply, as he deems fit. The decision of the arbitrator is called as 'award'.

Arbitrator must be neutral and shall not have any interest in either the subject matter or any relation with parties. If his relation with parties is such that it is likely to influence his rational decision, award given by the arbitrator in such dispute would become invalid. Though procedural technicalities do not apply for arbitral proceedings, arbitrator is bound to follow principles of natural justice.